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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 574

CHARLES M. DOLEMAN, ADMINISTRATOR OF THE ESTATE OF ROBERT R. DOLEMAN,

Petitioner,

vs.

HARRY LEVINE.

BRIEF FOR PETITIONER.

I

Statement.

This case involves the construction and interpretation of Section 933 (a), (b), (d), (e), (f), and (g) of the Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, C. 509, 44 Stat. 1424), as applied for purposes of a Workmen's Compensation Act for the District of Columbia (Act of May 17, 1928, C. 612, 45 Stat. 600), and the application of the decision of the Supreme Court of the United States in the case of the *Ætna Life Insurance Co.* v. *Moses*, 287 U. S. 530.

The case arises upon an appeal from an order of the Supreme Court of the District of Columbia overruling t

demurrer of the petitioner herein to the respondent's plea in abatement and a judgment entered in favor of the respondent upon the petitioner's election to stand upon his demurrer. The parties will be hereinafter designated as plaintiff and defendant.

On January 3, 1933, one Robert R. Doleman, an employee of the Potomac Electric Power Company, while working in a manhole in the street at Lincoln Road and R Street, Northeast, in the District of Columbia, was struck by an automobile owned by Harry Levine and operated by one Harry Barner, sustaining injuries from which he died on the same day. Robert R. Doleman left surviving him his widow, Mary E. Doleman, and his father, Charles M. Doleman, as his dependents and next of kin under the Compensation Act and the death statute.

The widow elected to receive compensation from Robert R. Doleman's employer, the Potomac Electric Power Company, under the Compensation Act. After she filed her claim for compensation, an award was made in her favor by the Deputy Commissioner, and she has been and is now receiving compensation from the Potomac Electric Power Company.

The father obtained letters of administration on the estate of Robert R. Doleman in the Supreme Court of the District of Columbia. Then the father, both as administrator and dependent of the said deceased employee, filed an election under the Compensation Act to proceed against the third party (Harry Levine), for the wrongful death of Robert R. Doleman.

On November 1, 1933, Charles M. Doleman, as the Administrator of the Estate of Robert R. Doleman, filed a suit in the Supreme Court of the District of Columbia against the defendant. The declaration proceeded to state a cause of action under the death by wrongful act statute, and alleged that the defendant acting by and through an

agent, servant, and employee negligently caused the death of Robert R. Doleman, and sought damages in the amount of Ten Thousand ($10,000) Dollars therefor.

Thereafter, on November 13, 1933, the Potomac Electric Power Company (hereinafter referred to as the "employer"), filed a suit in the Supreme Court of the District of Columbia against the defendant. The declaration proceeded to state a cause of action under the death by wrongful act statute assigned to the employer by the provisions of the Compensation Act, and alleged that the defendant, acting by and through an agent, servant, and employee, negligently caused the death of Robert R. Doleman, and sought damages in the sum of Ten Thousand Dollars ($10,000) therefor.

The defendant, Harry Levine, filed in each case a plea in abatement, setting forth in each plea the pendency of the other action, and in the administrator's action alleging that the cause of action was assigned by the terms of the Compensation Act to the employer, and in the employer's action alleging that by the terms of the death by wrongful act statute such an action should be brought by the administrator. The plaintiff and the employer, in their respective suits, each filed a demurrer to the plea in abatement. The cases came on for hearing together upon the respective demurrers and were argued and submitted to the court. The court sustained the demurrer to the plea in abatement in the employer's action; and overruled the demurrer to the plea in abatement in the plaintiff's action. The opinion of the Supreme Court of the District of Columbia was published in 62 W. L. R. 77.

An appeal was taken to the United States Court of Appeals for the District of Columbia; the appeal was argued in said court on October 4, 1934; and on the 5th day of November, 1934, the United States Court of Appeals en-

tered judgment affirming the aforesaid judgment of the Supreme Court of the District of Columbia; and rendered an opinion wherein it was held that the action is maintainable only by the employer in accordance with the provisions of Paragraph (b) of Section 933 of the District of Columbia Workmen's Compensation Act (U. S. C. A. Title 33, Chapter 18) (R. p. 12).

II.

Opinions of the Courts Below.

The memorandum opinion filed in the Supreme Court of the District of Columbia is reported in 62 W. L. R. 77.

The opinion of the United States Court of Appeals for the District of Columbia was rendered on the 5th day of November, 1934 (R. p. 12), and is reported in 62 W. L. R. 940.

III.

Questions of Law Presented.

(1) What is the proper construction of Section 933 (a) of the Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, C. 509, 44 Stat. 1424) as applied for purposes of a Workmen's Compensation Act for the District of Columbia (Act of May 17, 1928, C. 612, 45 Stat. 600), where one dependent elects both as administrator and dependent to sue third party wrongdoer while the other dependent elects to receive compensation?

(2) Who is the proper party to make the election referred to in Section 933 (a) of the said Longshoremen's and Harbor Workers' Compensation Act?

(3) Has the said Compensation Act repealed the death statute of the District of Columbia, where third party

wrongdoer is liable for the death of a deceased employee, so far as the rights of the next of kin of the deceased are concerned?

(4) What are the rights, first, of the person entitled to compensation who elects to sue third party wrongdoer; and, secondly, of the person entitled to compensation who elects to receive said compensation?

(5) Where the employer is given the right to maintain the action against third party wrongdoer, what is the proper distribution of the excess after reimbursement mentioned in Section 933 (e), (2) of said Act? Is this excess distributable among the next of kin or the dependents of the deceased employee?

(6) What is the proper application of the decision in the case of the *Ætna Life Insurance Co.* v. *Moses*, 287 U. S. 530?

(7) What are the rights of the personal representative of the deceased?

(8) If the employee maintains the action against the third party wrongdoer, must the declaration set out the next of kin of the deceased as required under the decision of *Neubeck* v. *Lynch*, 37 App. D. C. 576, or must it be confined to dependents under the Compensation Act who may not be next of kin under the death statute?

(9) Can the rights vested in dependents who elect not to receive compensation under Section 933 (a) of the said Longshoremen's and Harbor Workers' Compensation Act be nullified by those dependents who elect to receive compensation under the said Act?

IV.

Specification of Errors.

1. The court erred in affirming the judgment of the Supreme Court of the District of Columbia (62 W. L. R. 77).

2. The court erred in holding that where there are two dependents under the District of Columbia Workmen's Compensation Act, one of whom accepts compensation and the other elects to proceed against the third party wrongdoer to recover damages for wrongful death of deceased employee, the acceptance of compensation by the one transfers the entire cause of action against the said third party wrong-doer to the employer; under Section 933 (b) of said Act (R. p. 16).

3. The court erred in holding that where one beneficiary elects to receive compensation and another not to, the employer's right to reimbursement is lost, should the administrator maintain the action (R. p. 16).

4. The court erred in its application of the case of the *Ætna Life Insurance Co.* v. *Moses*, 287 U. S. 530.

5. The court erred in its construction of Section 933 (a), (b), (d), (e), (f), and (g) of the District of Columbia Workmen's Compensation Act. (45 Stat. 600.)

V.

ARGUMENT.

(A) The use of the term "person entitled to compensation" in Section 933 (a) of the Compensation Act has given rise to much confusion, where third party wrongdoer is responsible for the wrongful death of a deceased employee.

The facts in the instant case show that the plaintiff is the administrator of the estate of the deceased employee; and

a person entitled to compensation under the Compensation Act; as well as a next of kin within the meaning of the death by wrongful act statute of the District of Columbia.

On the other hand, the widow of the deceased employee is a person entitled to compensation under the Compensation Act and a next of kin within the meaning of the death by wrongful act statute of the District of Columbia.

The plaintiff elected to recover damages against the defendant, and this election was made in his capacity as the administrator, and also in the capacity of a person entitled to compensation. The widow accepted compensation. The question immediately arises with respect to who has the right of election to recover damages against the third party wrong-doer (defendant) or to accept compensation?

It must be conceded as fundamental that no cause of action existed at common law for the wrongful death of a human being. Such rights are creatures of statutory enactment. The wrongful death statute of the District of Columbia (Appendix pp. 31-32) gives to the next of kin of the deceased the right to receive all damages recoverable for the wrongful death of the deceased, but states that the action can be brought only by the personal representative of the deceased. The right to receive benefits from any amount recovered for the wrongful death of the deceased is a property right of all the dependents who are also all the next of kin. See

Re: Meekin v. *Brooklyn H. R. R. Co.*, 164 N. Y. 145.

What then is the logical purport of the language used in Section 933 (a) of the said Compensation Act? What did the Congress of the United States mean when it said that the "person entitled to compensation" may elect to sue third party wrong-doer or to accept compensation under the

Act? Whom did it intend to clothe with the power of election where there was one dependent who desired to pursue his right under the death by wrongful act statute while the other dependent wished to accept compensation under the act?

It must be assumed that Congress knew that the only rights that the dependents under the Compensation Act could assign to the employer were such rights as such dependents possessed as next of kin pursuant to the wrongful death statute of the District of Columbia.

Congress knew that the personal representative of the deceased was the only legal person competent to enforce any rights derivative of the wrongful death statute of the District of Columbia. Hence, the conclusion is inescapable that where there is one dependent who desires to assert his right against a third party wrong-doer and the other dependent wishes to accept compensation, the only logical person to make the election is the administrator. See:

Carpo v. *City of Syracuse*, 183 N. Y. 395.

It is true that the said Compensation Act is ambiguous; yet, there is sufficient clarity embraced therein to support the petitioner's right to make the said election. Section 933 (a) provides:

> "If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the commission may provide, to receive such compensation or to recover damages against such third person."

Here we have under this section of the said Act two separate and distinct classes of injuries. The first, "if on account of a disability," and the second, "or death." Bear-

ing in mind these two distinct classes of injuries let us see; do we find their sequences in Section 933 (f) and (g) of said Act? The provisions of the said paragraphs are as follows:

> (f) "If the person entitled to compensation or the representative elects to recover damages against such third person and notifies the commission of his election and institutes proceedings within the period prescribed in section 913 of this chapter, the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the commission determines is payable on account of such injury or death over the amount recovered against such third person."
>
> (g) "If a compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (e) only if such compromise is made with his written approval."

In Section 933 (f) we also have two distinct parties; first, "the person entitled to compensation" and, second, "the representative." In Section 933 (g) we again have two distinct parties; first, "the person entitled to compensation," and, second, "the representative."

What does this suggest? Does it not say in so many words that in case of disability the injured employee has the right of election and in case of death the personal representative of the deceased employee has the right of election? Is it not apparent that the compromise referred to in 933 (g) means that where the employee is injured he is given the right to compromise; but where the injury results in the death of the employee the personal representative is given the right to compromise the action?

Here it must be conceded that the Congress of the United States intended that the personal representative of the deceased employee (administrator) should have the right of election where all of the persons entitled to compensation do not agree to accept compensation. In fairness and justice to all parties concerned, the administrator is the logical person to make the election under the circumstances:

(B) **What are the rights of the next of kin of the deceased employee who are not also dependents?**

It was conceded by counsel for the respective parties in the *Ætna Life Case*, 287 U. S. 530, and strenuously contended here by counsel for the defendant that Section 933 (a) of the said Compensation Act of the District of Columbia (Appendix p. 29) has repealed the death by wrongful act statute of the District of Columbia (Appendix p. 31). Counsel for plaintiff cannot concur in this view. The Supreme Court of the United States has laid down some well defined rules with respect to the repealing of antecedent statutes by implication. It must be agreed that there is no direct expression in Section 933 or any other section of the District of Columbia Compensation Act that repeals the death by wrongful act statute of the District of Columbia where third party wrongdoer is liable for the death of a deceased employee. Counsel for defendant admit that the District of Columbia Workmen's Compensation Act is drafted after the New York Compensation Law (See p. 5 of defendant's brief in opposition to writ of certiorari). Does this admission not strengthen the plaintiff's position with respect to the preservation of the rights of the next of kin under the death by wrongful act statute? Under the New York Compensation Act (See appendix pp. 32-33) the entire cause of action is transferred to the carrier etc. where the dependents accept compensation; yet, the Court of Appeals of New York has held continuously that

the rights of the next of kin are not impaired by the acceptance of compensation by the dependents unless all of the dependents are also all of the next of kin; and all accept compensation. See

Zirpola v. *Casselman*, 237 N. Y. 367.

Section 933 (a) of the District of Columbia Compensation Act does not transfer the entire cause of action to the employer upon the acceptance of compensation, but instead "the right of the person entitled to compensation" (See appendix p. 29). It is very probable that a person entitled to compensation may not be a next of kin and vice versa. It is to be presumed that Congress was aware of this probability at the time of the passage of the Compensation Act; that it knew that a dependent who was not a next of kin of the deceased employee possessed no assignable rights under the death by wrongful act statute of the District of Columbia.

Knowing as the Congress must have known, that dependents who were not next of kin had no rights against third party wrongdoer, it failed in the Compensation Act to create a right against third party wrongdoer, and in view of such omission it is strenuously urged that it was not the legislative intent to divest the next of kin of their rights under the death by wrongful act statute where third party wrongdoer is liable for the death of a deceased employee.

In the case of *Molz* v. *Hansell et al.*, 175 Atl. 880 (Decided December 18, 1934), the Superior Court of Pennsylvania held that a dependent under the Compensation Law who is not a next of kin under the death by wrongful act statute has no rights which are assignable to the employer upon the acceptance of compensation.

The instant case involves the construction of two congressional statutes; and the Supreme Court of the United States has said that the repealing of an antecedent statute by a

subsequent one, by implication, is not favored. In the case of *Frost vs. Wenie*, 15 Sup. Ct. 532, 157 U. S. 45, the Supreme Court said,

> "That where two statutes cover in whole or in part the same matter and are not irreconcilable, no purpose to repeal being clearly expressed or indicated, it is the duty of the court, if possible, to give effect to both."

See also:

Charleston Corporation v. *Sinclair*, 264 U. S. 543.
United States v. *Burrough*, 289 U. S. 164.

In view of the above mentioned, it is fair to conclude that the said Compensation Act has left unimpaired the rights of next of kin under the death by wrongful act statute where third party wrongdoer is liable for the death of a deceased employee.

(C) What are the rights of dependents under the Compensation Act who give notice of their intentions to recover damages against third party wrongdoer?

The question here presented is identical to the question presented to the New York Court of Appeals at the time of the decision in the case of *Zirpola* v. *Casselman* (*supra*). The conditions confronting dependents who were also next of kin under the New York Compensation Act (See appendix pp. 32-33) and who elected to recover damages against third party wrongdoer were analogous to the present conditions of similar dependents under the District of Columbia Compensation Act (See appendix p. 28).

The decision in the case of *Travelers Insurance Co.* v. *Padula Co.*, 224 N. Y. 397, in construing Section 29 of Chapter 67 of the New York Compensation Act had given rise to the impression that the employer was given the right to maintain the action against third party wrongdoer where

any of the dependents accepted compensation; but the Court of Appeals of New York in the case of *Zirpola* v. *Casselman* (*supra*), speaking through Mr. Justice Cardozo in a most exhaustive opinion said:

> P. 372: "We think that the cause of action against third parties for the benefit of next of kin is unchanged by the Compensation Act except to the extent that the Act substitutes the carrier, upon the execution of appropriate assignments, to the distributive shares of next of kin who claim as dependents also. The Compensation Act did not create a new cause of action against wrongdoers other than the employer with a new class of beneficiaries. It found a cause of action already in existence, and assuming that this cause of action would continue in the future, it fixed the extent to which the shares that belonged to the dependents should be applied in reduction of the burdens that were placed upon the carrier."

The learned and far reaching opinion goes on to state that:

> P. 372: "The Compensation Act regulates the relation, not between a workman and the world, but between the workman and the employer. In doing this it charges the employer with liabilities of a different order. It leaves untouched, on the other hand, the duties and liabilities of wrongdoer outside of the relation which it regulates, and contents itself with guarding against a duplication of benefits by appropriate provision for subrogation or allowance. A dependent who is also within the class of next of kin may get his distributive share under the old act and thereafter under the new one, but what he gets upon the first must be credited upon the second."

In concluding the court laid down four fundamental principles which may well serve as a monumental guide in the construction of death by wrongful act statutes in con-

nection with compensation acts where third parties are liable for death of deceased employees.

P. 375: (1) "If dependents electing to assign are the only next of kin, the entire beneficial interest in the cause of action against the wrongdoer will pass by assignment to the carrier who may sue or compromise at will."

(2) "If dependents electing to assign are members of the class of next of kin, but not all members of that class, their assignment will be effective to the extent of their beneficial interest and no farther, and the carrier, like any other beneficiary must prosecute through the administrator as the statutory trustee, and may compromise or release it."

(3) "If dependents who are next of kin elect not to assign, but retain their cause of action, they retain it with all of the incidents prescribed by the laws of its creation."

(4) "These dependents who are not next of kin and who are, therefore, without beneficial interest in the cause of action against the wrongdoer, are not put to an election since they have nothing to elect."

The above decision lays down a liberal and equitable rule; a rule that guarantees the next of kin as well as dependents who elect not to assign their cause of action, the equal protection of the law. The question arose in New York again in the case of *U. S. Fidelity & Guaranty Co.* vs. *Graham & Norton Co.*, 254 N. Y. 50, where the court spoke as follows:

"Edward Streeter died as a result of an accident arising out of and during the course of his employment alleged to be due to the negligence of another not in the same employ. He left a widow and six children. Five of the children were included in the group of dependents under the age of 18, who, with the widow, came under the protection of the Workmen's Com-

pensation Act (Consol. Law C. 67). The sixth child, although belonging to the group of next of kin, did not come within the group of dependents protected by the Workmen's Compensation Law. The widow and five children, as was their right, elected to accept compensation rather than to pursue the statutory remedy through the appointment of an administrator against the alleged wrongdoer. They received an award which has been paid. The result was an assignment to the insurance carrier of their beneficial interest of the widow and dependent children, only in such a recovery as an administrator might have secured had one been appointed and instituted suit."

Held: "The authority of the *Zirpola* case is not impaired by the later decision in the *Staten Island* case (251 N. Y. 127, 167 N. E. 194). The action should have been brought through an administrator as the statutory trustee of the entire group of beneficiaries. If dependents electing to assign are members of the class of next of kin, but not all of the members of that class, their assignment will be effective to the extent of their beneficial interest and no farther, and the carrier, like any other beneficiary, must prosecute through the administrator as the statutory trustee, and may compromise or release its own interest, but no other."

Not only do the New York cases give the right of action to the administrator where some of the dependents elect to sue third party wrongdoer, but Section 933 (a) of the Longshoremen's and Harbor Workers' Compensation Act expressly reserves this right to dependents who desire to elect to sue third party wrongdoer. The said section provides as follows:

"If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner

> in such manner as the commission may provide, to receive such compensation or to recover damages against such third person."

In the case of *Betts* v. *Southern Ry. Co.*, 71 F. (2d) 787, decided on June 11, 1934, by Justice Parker of the Fourth Circuit, it was held that where the administrator had sued for the wrongful death of an employee by a third party wrongdoer and the widow accepts compensation subsequently, that such acceptance of compensation does not give the employer the right to be substituted as party plaintiff against the third party wrongdoer.

From the above decision it may be seen that the modern trend is for the adoption of the rule laid down by the New York Court of Appeals (237 N. Y. 367, 254 N. Y. 50) hereinbefore discussed in this brief.

It is fundamental that words employed in a statute must be given their plain and ordinary meaning. Section 933 (a) of the Act only transfers to the employer the right of dependents accepting compensation. This section does not transfer the entire cause of action to the employer because if Congress had intended such transfer it would have used the term "all of the rights of the personal representative of the deceased" instead of employing the term "all of the rights of the person entitled to compensation."

This contention is borne out by the usage of the term in Section 933 (c) where we find the following:

> "The payment of such compensation into the fund established in Section 944 of this chapter shall operate as an assignment of all of the rights of the personal representative of the deceased."

It is clear from the very language of the act that Congress intended to reserve to those dependents who elected to sue third party wrongdoer their cause of action. It is incon-

ceivable to think that Congress would guarantee dependents a cause of action and then deny them the right to assert that cause of action. The rule laid down by the New York Court of Appeals giving the administrator the right to maintain the action where all of the dependents do not elect to receive compensation secures to every class of beneficiaries both under the death statute and compensation law the just and equal shares that the law created for them.

(D) **The decision of the United States Court of Appeals for the District of Columbia imposes a burden upon dependents, electing not to assign their cause of action to the employer.**

It is noted that in the opinion of the United States Court of Appeals for the District of Columbia (R. 16), the following proposition of law is laid down:

> "If, therefore, it should be held that, in a case of death, where one beneficiary elects to receive compensation and another not to, the employer's exclusive right to bring the action is lost, the result would be either that the employer's right to reimbursement would be denied or the third party would be subjected to two separate and independent *suits for the same cause* of action."

A casual reading of Section 373 *et seq.* of the statute of distribution of the District of Columbia and the Compensation Act will unearth the fallacy reached in the above conclusion by the court. Upon what proposition of law or reason does the court below predicate its conclusion with respect to the employer's denial of reimbursement? It must be conceded without argument, that should all of the persons entitled to compensation elect to sue third party wrongdoer, the employer is not only denied the right of reimbursement, but is also liable to the persons en-

titled to compensation for any deficiency that exists between the amount of the judgment obtained and the amount the persons entitled to compensation are entitled to receive under the Compensation Act. Now let us assume for the purpose of the argument, that in the case at issue the administrator is given the right to maintain the action against the defendant. How would this affect the right of the employer to reimbursement? Certainly it cannot be argued that Congress intended the employer to be reimbursed as against those dependents who do not assign their cause of action to the employer. Is it not logical and reasonable to conclude that the employer is entitled only to the proportionate share of the dependent who elected to receive compensation? What, then, is the right of such employer and how is he to receive his reimbursement? The plaintiff, as administrator, would be required under the statute of the District of Columbia to make distribution in the following manner: The cost of administration, including a reasonable attorney's fee; then distribute the balance, one half to the employer per his assignment and one half to himself, since he is also the only next of kin of the deceased; see Sections 376 and 380 of the District of Columbia Code.

However, the argument does not stop here. Let us then consider the converse of the proposition enunciated above. What would be the amount receivable by the plaintiff, should the employer in the instant case be given the right to maintain the action and he recovers a judgment against the defendant in the amount of seven thousand five hundred (7,500) dollars? Out of this amount the plaintiff, a next of kin and dependent, who elected not to assign his cause of action, would receive approximately four hundred ninety-two (492) dollars, while the employer would receive approximately seven thousand eight (7,008) dollars. Should the administrator be given the right to maintain the action and

a similar judgment is obtained against the dependent, the employer would receive one half minus cost and a reasonable attorney's fee or approximately two thousand seven hundred (2,700) dollars each.

What then is the reason for the unequal distribution of the proceeds from a judgment recovered against third party wrongdoers where the employer maintains the action? The answer lies in Section 933 (e), (1), (A), (B), and (C) of the District of Columbia Compensation Act, which reads as follows:

> (e) "Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise shall be distributed as follows:
>
> (1) The employer shall retain an amount equal to:
>
> (A) The expenses incurred by him in respect of such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner).
>
> (B) The cost of all benefits actually furnished by him to the employee under section 907 of this chapter.
>
> (C) All amounts paid as compensation, and the present value of all amounts payable as compensation, such present value to be computed in accordance with a schedule prepared by the commission, and the amounts so computed to be retained by the employer as a trust fund to pay such compensation as it becomes due and to pay any sum, in excess of such compensation, to the person entitled to compensation or to the representative; and——

It is because of the hardship which the reimbursements, mentioned in the above section would work upon those dependents who elected not to assign their cause of action, that we insist Congress could not have intended to give the right of action to the employer in the instant case.

(E) Should the employer maintain the action against third party in the instant case, what should be the proper distribution of the excess after reimbursement?

Section 933 (2) of the said Compensation Act provides:

"The employer shall pay any excess to the person entitled to compensation or to the representative."

It is to be observed that this section does not provide whether the person entitled to compensation or the representative shall distribute the excess received by him to the next of kin, or dependents who elected not to assign or whether such excess is to be retained by him. Naturally the question arises with respect to what is the proper distribution of the excess referred to in Section 933 (2) of the said Act.

If the person entitled to compensation is to make the distribution according to the statute of distribution in the District of Columbia, he cannot make said distribution as such, but must qualify as administrator before said distribution can be made. If the personal representative is to make the distribution, to whom should he make such distribution? Under the statute of the District of Columbia he is limited in making distribution to the next of kin of the deceased.

In considering the right of the employer to maintain the action against third party, we cannot overlook the question as to how should the declaration be drawn. The decision of the United States Court of Appeals for the District of Columbia in *Neubeck* v. *Lynch*, 37 App. D. C. 576, holds that in an action for wrongful death the next of kin of the deceased must be named in the declaration. Should the dependents who assign their cause of action to the employer be not also next of kin of the deceased, grave doubt must arise as to how the action could be maintained by the em-

ployer since the said Compensation Act fails to provide the mode of procedure where the employer sues the third party wrongdoer.

(F) The United States Court of Appeals erred in its application of the Ætna Life case, 287 U. S. 530.

It is indeed a most difficult task confronting counsel for the plaintiff in endeavoring to place a construction upon a decision of the Supreme Court of the United States in argument before the highest tribunal of the land. However, it is our position that the United States Court of Appeals for the District of Columbia erred in its application of the *Ætna Life* case (*supra*); we therefore, proceed to defend this position.

What were the circumstances and conditions surrounding the *Ætna Life* case (*supra*) at the time of the decision therein? Is it not true that there was no objection made on behalf of the administratrix as to who should maintain the action? Is it not true that the real question urged by counsel for the plaintiff was that with respect to the right of the insurance company to maintain the action because of a contractual right of subrogation instead of the employer?

The facts in the *Ætna Life* case (*supra*) differ materially from the facts in the case at issue. In the said *Ætna Life* case the widow was the administratrix of the estate of the deceased and also the only person entitled to compensation under the Compensation Act. Under such circumstances the widow was the most competent person in all the land to make the election to accept compensation, and by so doing transferred the entire cause of action to the employer. What reason underlies this principle? It is because the widow as administratrix was clothed with the authority to bind the next of kin under the death by wrongful act statute, and also as the only dependent under the Compensation Act. She was the sole beneficiary under both

statutes and in a position to assign the entire cause of action to the employer. In the case of *Travelers Insurance Co.* v. *Padula Co.*, 224 N. Y. 397, where there was a widow and two minor children constituting all of the next of kin and dependents of the deceased, the widow accepting compensation for herself and two minor children, the court held that the action was maintainable by the carrier without the appointment of an administratrix. In the *Zirpola* case hereinbefore discussed the court in its first principle said,

> "If dependents electing to assign are the only next of kin, the entire beneficial interest in the cause of action against the wrongdoer will pass by assignment to the carrier who may sue or compromise at will."

We cannot close our eyes to the fact that the above mentioned cases were accessible to the court at the time of the decision in the *Ætna Life* case (*supra*). It is interesting to note from the very outset the expression of Mr. Justice Stone speaking in the *Ætna Life* case (*supra*), where on pages 538 and 539 he said,

> "The election to accept compensation was made by the widow *as she is both the administratrix and the only person entitled to compensation,* the election was validly exercised and we need not resolve possible doubts as to the proper person to make the election under other circumstances."

The very language used by the learned Justice from the very outset clearly shows that the *Ætna Life* case (*supra*) must be limited to the facts contained in that case. The facts in the present case, however, show that the plaintiff is the administrator of the estate of the deceased; that he is a dependent under the Compensation Act who elected to sue third party wrongdoer; and that he is a next of kin within the meaning of the District of Columbia death statute; while the widow is a dependent under the Compen-

sation Act and a next of kin within the meaning of the death statute of the District of Columbia.

It is reasonable to infer that the decision in the said *Ætna Life* case rests on the first principle laid down in the *Zirpola* case (*supra*). It is equally reasonable to contend that the second principle laid down in the *Zirpola* case (*supra*) is applicable to the case at issue and ought to be adopted by the Supreme Court of the United States in determining the question here presented.

On page 540 of the said case the United States Supreme Court observed that the administrator was not the only person who may maintain the action, and said further that where the employer is given anything to recover, it is the entire recovery provided by the wrongful death act. It is this part of the decision in the *Ætna* case (*supra*) that led both of the courts below to the decision that they reached.

The effect of this part of the decision must be considered in the light of the facts before the court at that time. It is unreasonable to assume that the Supreme Court of the United States would predicate an opinion covering more than the points that were actually before the court at the time of the decision. Our belief in this wise is strengthened by that portion of the court's opinion on page 543 where the court said,

> "Nor do we consider what would be the rights of the person entitled to compensation or the personal representative of the deceased."

And at this point the court referred to the case of *U. S. Fidelity & Guaranty Co.* v. *Graham & Norton Co.*, 254 N. Y. 54-55, cited hereinbefore. Is it not significant that the court made reference to pages 54 and 55 of the *New York* case (*supra*)? A reading of the case on the pages referred to by the court reveals that where there are dependents or next of kin, who do not assign their cause of

action, the administrator is the proper party plaintiff to maintain the action.

Much wisdom is embraced in the opinion written by Mr. Justice Cardozo in the *Zirpola* v. *Casselman* case (*supra*) and the opinion of Mr. Justice Pound in the *U. S. Fidelity and Guaranty Co.* v. *Graham & Norton Co.* case (*supra*), to say the least of the most recent opinion of Mr. Justice Parker of the Fourth Federal Circuit in *Betts* v. *Southern Ry. Co.* (*supra*).

It may be observed that two cases decided by the United States Circuit Court of Appeals for the Fourth and Fifth Circuits and cited by counsel for defendant on page five (5) of their brief in opposition to petition for a writ of certiorari, clearly demonstrate the attitude of employers who are given the right to maintain the action where third party is liable for injury or death. In one of the said cases, *Hunt* v. *Bank*, 35 F. (2d) 136, the court held that where the employee had accepted compensation and the employer refused to sue third party wrongdoer, there was no remedy open to the said employee to recover the excess after reimbursement afforded him under the Compensation Act.

In the other case, *Moore* v. *Christensen S. S. Co.*, 53 F. (2d) 299, the court held that even though the administrator brought the action against the third party wrongdoer, and at the time it was brought, the employer had not paid the one thousand ($1,000) dollars into the sinking fund pursuant to Section 944 of the Longshoremen's and Harbor Worker's Compensation Act (see appendix p. 30), the subsequent paying of the said one thousand ($1,000) dollars into the said fund by the employer was sufficient ground for the dismissal of the suit brought by the administrator, and the administrator could not complain because of the failure of the employer to sue third party wrongdoers for wrongful death of deceased employee.

The *Moore* case (*supra*) was decided under Section 933 (c) of the said Longshoremen's Act, and it was an instance where there was no person entitled to compensation, but where the deceased employee left next of kin.

While the questions presented in these two cases are not before the court on this appeal yet they may serve as a guide in limiting the right of the employer to the strict letter of the statute. There can be no question that where the employer controls the interest of the third party wrongdoer, upon appropriate assignment he will almost never institute proceedings against such third party wrongdoer and the result is that the administrator or the employee is denied the right to receive the excess after reimbursement guaranteed under the Compensation Act.

The opinion of the United States Court of Appeals for the District of Columbia (R., p. 17) quotes from page 540 of the opinion of the Supreme Court of the United States in the *Ætna Life* case (*supra*) as follows:

> "'Concluding that where the employer is given anything to recover it is the full recovery provided by the wrongful death act.'"

The said United States Court of Appeals for the District of Columbia stated further in its opinion:

> "In the facts here, the employer, having paid compensation to the widow, under the provisions of the act is entitled to recover the amount paid. We think this is perfectly clear and, if it be granted, it follows inevitably that in the light of the above quoted language of the Supreme Court the right to recover part is the right to recover all."

We fail to find the analogy between the above language used by the Supreme Court and that employed by the said United States Court of Appeals for the District of Columbia. The question then is when is the employer given

anything to recover? It is submitted that under the said Compensation Act the only instances in which the employer is given anything to recover, where third party is liable for the death of deceased employee are:

(1) Where all of the next of kin are all of the persons entitled to compensation and all accept compensation, and

(2) Under Section 933 (c) of the said Compensation Act. (See appendix p. 29.)

Juristic thought has long since agreed that before a court should give such an interpretation to a statute that works a hardship upon a particular class or group, it ought to struggle with all of the intellect that it possesses and with all of the vigor of mind that it has against such an interpretation of such statute; and, unless the court is forced to come to a contrary conclusion it ought to assume that it is impossible that the Legislature could have so intended. The substance of the above expression was laid down in *Plumstead Board of Works* v. *Spackman*, L. R. 13, Q. B. D. 878; and received the approval of the Supreme Court of the United States in *Sorrell* v. *United States*, 287 U. S. 435.

In view of the rights of the next of kin under the death by wrongful act statute of the District of Columbia and the rights of the dependents under the District of Columbia Compensation Act who elect to recover damages against third party wrongdoer for the death of deceased employees, it is sincerely urged that this Court reverse the said decision of the United States Court of Appeals for the District of Columbia.

Conclusion.

Under a practical application of the Compensation Act and in the light of the cases cited, it is submitted that the administrator has the right to maintain the action under the facts disclosed in the instant case, and that by virtue of same the Supreme Court of the United States should reverse the judgment of the court below.

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APPENDIX.

District of Columbia Workmen's Compensation Act, U. S. C. A. Title 33, Chapter 18.

Section 909. *Compensation for Death:*

"If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

(a) Reasonable funeral expenses not exceeding $200.

(b) If there be a surviving wife—and no child of the deceased under the age of eighteen years, to such wife—35 per centum of the average wages of the deceased, during widowhood * * * with two years compensation in one sum upon remarriage;" * * *

Section 914. *Payment of Compensation* * * *:

(m) "The total compensation payable under this chapter for injury or death shall in no event exceed the sum of $7,500."

Section 917. *Compensation a Lien Against Assets:*

"Compensation shall have the same preference of lien against the assets of the carrier or employer without limit of amount as is now or may hereafter be allowed by law to the claimant for unpaid wages or otherwise." * * *

Section 932. *Security for Compensation:*

(a) "Every employer shall secure the payment of compensation under this chapter—

(1) "By insuring and keeping insured the payment of such compensation with any stock company or mutual company or association, or with any other person or fund * * *."

Section 933. *Compensation for Injuries Where Third Persons Are Liable:*

(a) "If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the commission may provide, to receive such compensation or to recover damages against such third person."

(b) "Acceptance of such compensation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person, whether or not the person entitled to compensation has notified the deputy commissioner of his election."

(c) "The payment of such compensation into the fund established in section 944 of this chapter shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as 'representative') to recover damages against such third person, whether or not the representative has notified the deputy commissioner of his election."

(d) "Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceedings."

(e) "Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise shall be distributed as follows:

(1) The employer shall retain an amount equal to——

(A) The expenses incurred by him in respect of such proceedings or compromise (including a reason-

able attorney's fee as determined by the deputy commissioner).

(B) The cost of all benefits actually furnished by him to the employee under section 907 of this chapter.

(C) All amounts paid as compensation, and the present value of all amounts payable as compensation, such present value to be computed in accordance with a schedule prepared by the commission, and the amounts so computed to be retained by the employer as a trust fund to pay such compensation as it becomes due and to pay any sum, in excess of such compensation, to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

(f) "If the person entitled to compensation or the representative elects to recover damages against such third person and notifies the commission of his election and institutes proceedings within the period prescribed in section 913 of this chapter, the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the commission determines is payable on account of such injury or death over the amount recovered against third person."

(g) "If a compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (e) only if such compromise is made with his written approval."

Section 944. *Special fund.*—

(c) "Payments into such fund shall be made as follows:

(1) "Each employer shall pay $1,000 as compensation for the death of an employee of such employer

resulting from injury where the deputy commissioner determines that there is no person entitled under this chapter to compensation for such death. Fifty per centum of each such payment shall be available for the payments under subdivision (f) of section 908 of this chapter, and 50 per centum shall be available for payments under subdivision (g) of said section."

Code of Law for the District of Columbia.

Chapter Forty-five.

Negligence Causing Death.

Section 1301. *Liability.*—

"Whenever by an injury done or happening within the limits of the District of Columbia the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured—to maintain an action and recover damages, the person who or corporation which would have been liable if death had not ensued shall be liable to an action for damages for such death, notwithstanding the death of the person injured—and such damages shall be assessed with reference to the injury resulting from such act, neglect, or default causing such death, to the widow and next of kin of such deceased person: *Provided,* That in no case shall the recovery under this act exceed the sum of ten thousand dollars • • •"

Section 1302. *By Whom Suit To Be Brought.*—

"Every *such* action shall be brought by and in the name of the personal representative of such deceased person, and within one year after the death of the party injured."

Section 1303. *Distribution of Damages.*—

"The damages recovered in such action shall not be appropriated to the payment of the debts or liabilities

of such deceased person, but shall inure to the benefit of his or her family and be distributed according to the provisions of the statute of distribution in force in the said District of Columbia."

New York Compensation Law.

Section 29, Chapter 67:

"If an employee entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ such injured employee, or in case of death, his dependents, shall before any suit or any award under this chapter, elect whether to take compensation under this chapter or to pursue his remedy against such other. Such election shall be evidenced in such manner as the commissioner may by regulation prescribe. If such injured person, or in case of death, his dependents, elect to take compensation under this chapter, the awarding of compensation shall operate as an assignment of the cause of action against such other to the state for the benefit of the state insurance fund if compensation be payable therefrom, and otherwise to the person, association, corporation, or insurance carrier liable for the payment of such compensation, and if he elects to proceed against such other, the state insurance fund, person, association, or corporation, or insurance carrier as the case may be, shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected and the compensation provided or estimated by this chapter for such case. In case of payment of an award in accordance with subdivision 9 and 10 of section 15, such payment shall operate to give to the employer or insurance carrier liable for the award a cause of action for the amount of such payment together with a reasonable funeral expense and the expense of medical treatments, which shall be in addition to any cause of action by the legal representative of the deceased. Such a cause of action as-

signed to the State may be prosecuted or compromised by the commissioner.

"A compromise of any such cause of action by the employee or his dependents at an amount less than the compensation provided for by this chapter shall be made only with the written approval of the commissioner, if the deficiency of compensation would be payable from the State insurance fund, and otherwise with the written approval of the person, association, corporation, or insurance carrier liable to pay the same. Wherever an employee is killed by the negligence or wrong of another not in the same employ and the dependents of such employee entitled to compensation under this chapter are minors, such election to take compensation and the assignment of the cause of action against such other and such notice of election to pursue a remedy against such other shall be made by such minor, or shall be made on behalf of such minor by a parent of such minor, or by his or her duly appointed guardian as the board may determine in each case."

(6110-C)